No. 82-1565

In The
Supreme Court of the United States
October Term, 1983

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC.,
Appellants,

vs.

GEORGE FREITAS, DIRECTOR OF TAXATION OF
THE STATE OF HAWAII,
Appellee.

On Appeal from the Supreme Court of the
State of Hawaii

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Appellee cannot accept the general and vague questions posed by the Appellants. The questions here may be reasonably stated as follows:

1. Are the Appellants entitled to any relief in this cause when they have not borne the economic burden of the Hawaii Liquor Tax which by statute is passed on from the Appellant liquor wholesalers to the liquor retailers?

2. If the Appellants are entitled to no relief do they have standing to bring this action?

3. Is this case moot since the exemptions in question have expired?

4. If this Court should find that the limited exemptions in question are invalid, should the remainder of the Hawaii Liquor Law be upheld under the principle of severability or alternatively, should this case be remanded to the Hawaii Supreme Court for resolution of the severability question?

5. If this Court should find that the limited exemptions in question are invalid, should this decision be given only prospective application because Hawaii, in enacting the exemptions, was entitled to rely on the prior decisions of this Court under the Twenty-first Amendment?

6. Has the State of Hawaii imposed their liquor excise tax on Appellants in conflict with the Equal Protection Clause, Import-Export Clause or Commerce Clause

restrictions of the United States Constitution because it has exempted from this tax for a limited period two unique Hawaiian alcoholic beverages, namely, pineapple wine and okolehao, in the absence of any showing by the Appellants that these exemptions have any impact on their importation and sale of certain alcoholic beverages (beer and grape wine) in Hawaii and in the absence of any showing that these limited exemptions have had an impact on the free flow of any alcoholic beverages into Hawaii from either interstate or foreign commerce?

7. If the Hawaii Liquor Tax is held invalid, and this decision is not limited to prospective application, are Appellants entitled to receive a windfall of over $100 million dollars in tax collections, when they have not borne the economic burden of the tax and when they have separately stated and passed on the tax to the liquor retailers, as provided by statute?

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COUNTERSTATEMENT OF THE CASE

The Hawaii Liquor Tax is an excise tax which is imposed on the wholesale sale of liquor sold or used in the State. Hawaii Rev. Stat. 244-4. The tax was originally enacted in 1939 to defray "the costs of police, institutions and some other branches of government [which] have been greatly increased due to liquor."[1] When originally enacted, the Liquor Tax contained no exemptions. The tax is imposed on all wholesale liquor sales within the state except for limited exemptions. Section 244-4(3) exempts liquor "which under the Constitution and laws of the United States cannot be legally subjected to the tax. . . ." Appellants' Br. at 3. However, if the liquor tax cannot constitutionally be collected on any transaction or person, the collection is shifted to the next person that is involved in the sale or use of any liquor. Thus, if Appellants,[2] as wholesalers of liquor in Hawaii, are Constitutionally exempted from the tax, their purchasers (the liquor retailers) would be liable for the tax on their subsequent sale of the liquor products.

Though the Appellants were required to remit the tax to the Appellee (Hawaii Rev. Stat. § 244-6), they were permitted to separately state the tax and collect it from the retail dealers. In turn, the retail dealers were required to remit the tax to the Appellants within twenty days after the end of the month in which the purchase has

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[1]Hawaii H. J. 1939 at 1022-1025.

[2]The Appellants in this appeal are Bacchus Imports, Ltd. and Eagle Distributors, Inc. The appeals of the other two distributors, Foremost-McKesson, Inc. and Paradise Beverages were consolidated for disposition in the court below, but they have not joined in this appeal. Foremost-McKesson, Inc. has filed a "Brief for Appellee in Support of Appellants."

been made. Hawaii Rev. Stat. § 281-83. In the event a retailer fails to do so, his license is subject to suspension; (*id.*) and if Appellants fail to notify the liquor commission of this failure, their licenses also would be subject to suspension. (Hawaii Rev. Stat. §§ 244-5, 244-6, and 281-83 are reproduced as appendix C to this brief.) In conformity with this statutory pattern, the Appellants have added the liquor tax to their normal selling price and have collected the same from their purchasers. (See paragraphs 12-14 of the Stip. of Facts of Bacchus, J. A. at 15-16 and paragraphs 11-13 of the Stip. of Facts of Eagle, J. A. at 8-9.)

Because the Hawaii legislature sought to encourage the development of a limited liquor industry in Hawaii (see Appellants' Brief at 5-6 and Jur. Stmt. App. A at A-12-13), it exempted Okolehao from the liquor tax from May 17, 1971 to June 30, 1981 and fruit wine from May 17, 1976 to June 30, 1981. Okolehao is an alcoholic beverage made from the root of the Ti plant, an indigenous shrub of Hawaii. Jur. Stmt. App. A, fn. 7 at A-34. The only fruit wine manufactured in Hawaii was pineapple wine. *Id.*

These products are not liquor items that enter into the mainstream of the consumption or sales of liquor either in Hawaii or anywhere else. They are items which are not generally available, as are other liquor products. Attached to this brief as Appendix A are schedules prepared by personnel of the Department of Taxation of the State of Hawaii from actual liquor tax returns. These schedules show that sales of okolehao and pineapple wine constituted between .2221% of one percent to .7739 of one percent of the total liquor sales in Hawaii for all the

years 1976 through 1981. Total liquor tax collection amounted to $88 million dollars and the total tax exemptions for okolehao and pineapple wine amounted to approximately $320,000. The figures also indicate that in 1976, the first year of the exemption of fruit wine, none was produced in Hawaii and that okolehao sales declined 217% from 1976 to 1981.

As to these exemptions, the Hawaii Supreme Court stated:

1. "We have good reason to believe neither okolehao nor pineapple wine is produced elsewhere." *Id.* fn. 20 at A-39.

2. "We believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii." *Id.* fn. 21 at A-39.

Appellants do not challenge these conclusions. They have submitted their case on stipulations of fact. There is nothing in these facts to indicate: (1) that the Appellants have in any way been injured by the unique limited exemptions in question; (2) that these exemptions promoted products in Hawaii in competition with any imported products; (3) that the exemptions had any impact on the free flow of commerce; or (4) that the Appellants are entitled to any relief, including the refunds claimed, since by statute they have passed the economic burden of the tax on to the liquor retailers.

Appellants have simply rested their case on the assumptions: (1) that the existence of *any* exemptions for Hawaiian produced liquor, irrespective of the nature, scope, or purpose of the exemptions, constitutes protectionist *per se* legislation which invalidates the entire liquor excise tax; and (2) that they are entitled to refunds of all

the taxes that they have paid within the period of the statute of limitations even though they have not borne the economic burden of the tax.

In regard to the issues in this cause, it is significant that the Appellants are only wholesalers of beer and grape wine in Hawaii (Complaint of Eagle Distributors, Inc., App. B at B-9-10; Complaint of Bacchus Imports, Ltd., App. B at B-1). As to Appellants, then, the question is the effect of the limited exemptions on the importation of beer and wine.

There is thus posed here the substantive question of whether limited exemptions to promote the production of okolehao and pineapple wine, products peculiar to Hawaii which are noncompetitive with other liquor products and of limited commercial value, require the Court to invalidate Hawaii's general liquor excise law.

SUMMARY OF ARGUMENT

The Appellants instituted this action for a refund of liquor taxes paid.[3] They are entitled to no refund because they have not borne the economic burden of the taxes.[4] In addition, they are entitled to no declaratory relief. The

[3]The "Complaint For Refund of Liquor Taxes" of Bacchus Imports, Ltd. and Eagle Distributors, Inc. are reproduced as Appendix B to this brief.

[4]As stated in 84 C.J.S., Taxation, § 632: *"A taxpayer who has been otherwise compensated* for the taxes paid is not entitled to a refund thereof" citing *State ex rel. Old Line Life Ins. Co. v. Olsness,* 63 N.D. 695, 249 N.W. 694 (1933). Cf. *Washington Plaza Associates v. State Bd. of Assessments Appeals,* 620 P. 2d 53 (Colo. App. 1980); *State ex rel. Szabo Food Services, Inc. v. Dickinson,* 286 So. 2d 529 (Fla. 1973); *W. F. Monroe Cigar Co. v. Dep't of Revenue,* 50 Ill. App. 3d 161, 365 N. E. 2d 574 (1977); *Consolidated Distilled Products Inc. v. Mahin,* 56 Ill. 2d 110, 306 N. E. 2d 465 (1973), *appeal dismissed,* 419 U. S. 809 (1974).

question at issue is moot. J. A. at 9, 22. The Appellants thus do not have standing to bring this action because of the absence of a justiciable case or controversy.[5] If the Appellants had standing and the question posed was not mooted by the expiration of the exemptions, even if the exemptions are invalid, they should not be construed to invalidate the entire liquor law which was enacted in 1939 to compensate the State for governmental costs related to the use and sale of alcoholic beverages.[6] The exemptions should be severed from the remainder of the liquor tax if they are invalid.[7] For, the Hawaii legislature would not have intended to throw the government of the State of Hawaii into a fiscal crisis for the limited benefit it sought to achieve by promoting the development of a unique Hawaii liquor industry. The exemptions are not an integral part of the Hawaii Liquor Tax Law since: (1) the law as a whole has as its purpose the generation of revenue; the exemptions have as their purpose the promoting of a local industry; (2) the exemptions were added as amendments to the law many years after its original enactment; (3) elimination of the exemptions would not alter the law's basic operation. (In fact, the okolehao and fruit wine exemptions have been eliminated). In no event should a decision on the merits be given retroactive application because under prior decisions of this Court, the exemptions would be valid.[8] *California v. Washington*, 358 U. S. 64 (1958).

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[5]*United States v. Jefferson Electric Manufacturing Co.*, 291 U. S. 386 (1934); *Valley Forge v. American United*, 454 U. S. 464 (1982).

[6]See Haw. H. J., April 10, 1939 at 1022-1025.

[7]See *United States v. Jackson*, 390 U. S. 570, 585-591 (1968) and cases cited therein; *Reitz v. Mealey*, 314 U. S. 33 (1941); *Field v. Clark*, 143 U. S. 649, 695-696 (1892).

[8]See, for example, *England v. Louisiana State Bd. of Medical Examiners*, 375 U. S. 411, 422 (1964), quote in footnote 17 *infra*.

Even if the Constitutional issues sought to be raised by Appellants were properly before this court, there is no merit to Appellants' position. Any Equal Protection Clause, Commerce Clause or Import-Export Clause restrictions as pertains to liquor must be considered in light of the Twenty-first Amendment. When these Constitutional provisions are considered together, a State's authority to deal with liquor traffic must be weighted against any federal concern in regard to the free flow of commerce.[9]

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[9]As stated in *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. 324 at 332 (1964):

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case.

(See *Craig v. Boren*, 429 U. S. 190 at 206 (1976), where the substance of the above quote is affirmed.)

And as noted in *Dep't of Revenue v. James Beam Co.*, 377 U. S. 341, 344 (1964):

> As we noted in *Hostetter . . . ante* p. 330: '[t]his Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption in its borders.' (Footnote omitted wherein is cited *State Board v. Young's Market*, 299 U. S. 59 (1936).)

The Court in *Beam* also recognized the continued validity of the Webb-Kenyon and Wilson Acts and *De Bary v. Louisiana*, 277 U. S. 108 (1913). In *De Bary* the Court upheld a license tax which was imposed solely on the business of sale of foreign liquor and wine in original packages. (In *Beam*, the Court simply refused to construe the Twenty-first Amendment to completely repeal the Export-Import Clause as to intoxicants (377 U. S. at 345).)

Where, as here, there is no showing that the free flow of commerce has been affected by the limited exemptions in question, the protectionist *per se* rule relied upon by the Appellants cannot logically override Hawaii's interest in the taxation and regulation of its instate liquor traffic or its interest in promoting a local industry. To hold otherwise would simply read the Twenty-first Amendment out of the Constitution in its relationship to the Commerce, Equal Protection and Import-Export Clauses. Since the Twenty-first Amendment was enacted to prevent the Commerce Clause from restricting the State's power to control liquor distribution, production and sales, Appellants' construction of the Commerce Clause conflicts with the Twenty-first Amendment.

Appellants' reliance on the protectionist *per se* rule is improper even if it is not limited by Twenty-first Amendment considerations. In applying Constitutional provisions which conflict with State's taxing or police powers, the Court has always balanced the federal and state interests in resolution of the conflict.[10] The question of whether the Commerce Clause burden is permissible depends on the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Hughes v. Alexandria Scrap*, 426 U. S. 794, 804 (1976). This Court has recently held that local subsidies to encourage local industry posed no burden on interstate commerce.[11] In substance, the liquor tax exemp-

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[10]*Lewis v. BT Investment Managers, Inc.*, 447 U. S. 27 (1980); *Minnesota v. Cloverleaf Creamery Co.*, 449 U. S. 456, 474 (1981).

[11]*White v. Massachusetts Council of Construction Employees*, — U. S. —, 103 S. Ct. 1042 (1983); *Reeves, Inc. v. Stake*, 447 U. S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794 (1976); *Pike v. Bruce Church, Inc.*, 397 U. S. 137 (1970).

tions in question do not differ from industry subsidies. The burden here on commerce (if in fact any such burden existed) would be identical if the liquor tax were collected on sales of okolehao and pineapple wine and a minor subsidy in the amount of tax collected were paid the manufacturers.

The exemptions were not designed to impose a discriminatory tax on liquor imported into Hawaii for sale and use. Rather, they were enacted to stimulate the manufacture of a small fraction of the liquor products produced in Hawaii. They were enacted to promote the development of a non-existent local industry (pineapple wine production) or to help save a local industry that was struggling to survive (okolehao production). The legislative history of the exemptions makes no mention of competing imported liquor products. The products exempted were not manufactured elsewhere; nor marketed in competition with such products. Their exemption therefore had no effect on either interstate or foreign commerce. See Jur. Stmt. App. A at A-12-13.[12] *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117 (1978) is dispositive of the discrimination issue here. There the Court disposed of the interstate discrimination argument on finding that there was no intrastate commerce to be favored. Here there is no interstate or foreign products which compete with the unique exempt Hawaiian products. As *Exxon* holds, if there is no discrimination against inter-

[12]The entire argument of appellants is based on the premise that all liquor products are the same and are necessarily competitive. However, the Court in anti-trust product market cases has taken a different view. See *Brown Shoe Co. v. United States*, 370 U. S. 294, 325 (1962); *United States v. DuPont & Co.*, 351 U. S. 377, 395 (1956).

state or foreign commerce as a matter of fact, there is none under the Constitution.

For the foregoing reasons, this matter should be dismissed for lack of jurisdiction. Alternatively, it should be summarily disposed of on the merits because the Appellants have not established any discrimination against interstate or foreign commerce. Further, if the exemptions are held to be invalid, they should be severed from the rest of the statute (or remanded for resolution of this issue) and a decision so holding should be given only prospective application.

ARGUMENT

I. Introductory Considerations.

Before considering the merits of the Appellants' constitutional arguments, it is necessary to determine whether they have any standing to raise them. They are not the champions of any Constitutional rights except their own. *Frothingham v. Mellon,* 262 U. S. 447, 487-88 (1923). The question of standing relates to: (1) whether the Appellants have suffered any damages or are otherwise entitled to any relief (which in turn is determinative of whether there is before the Court a justiciable controversy), and (2) whether any decision on the merits should be given only prospective application. The question of whether the Appellants are entitled to any relief is dependent upon (1) whether they have borne the economic burden of the tax; and (2) whether the exemptions in question are severable from the remainder of the Liquor Tax Law. We will first consider these issues before turning to the merits of the Appellants' constitutional arguments.

In disposing of the substantive issues, the Hawaii Supreme Court properly found that the Hawaii Liquor Tax Law did not violate the Commerce Clause standards enunciated in *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274 (1977); the Import-Export Clause standards of *Michelin Tire Corp. v. Wages,* 423 U. S. 276 (1976); or the Equal Protection Clause standards of *Minnesota v. Cloverleaf Creamery Company,* 449 U. S. 456 (1981) and comparable cases. The tax in question is not imposed on imports or sales in interstate commerce. It is nondiscriminatory in operation and effect. It is imposed only on intrastate activity and it is reasonably apportioned and related to these activities. The Hawaii Supreme Court properly so concluded. The substantive portion of this brief emphasize different aspects of these constitutional questions in support of the conclusions of the Court below.

II. The Appellants Are Not Entitled To Any Relief Because They Have Not Borne The Economic Burden Of The Tax Which By Statute Is Passed On To The Liquor Retailers.

The Appellants sell beer and grape wine to licensees (liquor retailers) in Hawaii at a price equal to their wholesale price plus the 20% tax imposed by § 244-4 of the Liquor Tax Law, plus the one-half percent tax on the wholesale price imposed by Hawaii Rev. Stat. § 237-13(2) (A). J. A. at 15, 22. The wholesale price includes the landed costs of such liquor products in Hawaii plus the Appellants' normal mark-up. *Id.* at 15, 21. Pursuant to Hawaii Rev. Stat. § 281-83, the Appellants' vendees (liquor retailers) are required to pay the liquor tax in question to Appellants within 20 days after the end of the month in which the purchase has been made. This Section further provides: that (1) "on the failure to make the payment

within such time the liquor commission may in its discretion suspend the license of the purchaser . . . ."; and (2) Appellants are required to report this failure to the Liquor Commission or risk the suspension of their licenses.

There can be no doubt that this tax as a practical matter is required to be passed on to Appellants' purchasers and that Appellants did so. See *United States v. State Tax Comm'n of Mississippi,* 421 U. S. 599 at 609, n. 8 (1975). The Appellants have not borne the economic burden of the tax in question.[13] They have separately stated the tax and collected it from the retail liquor dealers. Since the Appellants' request for relief is the refund of liquor taxes paid (App. B, Complaint for Refund of Liquor Taxes of Bacchus Imports Ltd. at B-8), they have asked for no relief that they are entitled to. They would be unjustly enriched by any refund. The general policy against unjust enrichment through the refund of illegal taxes was stated in the annotation to *United States v. Jefferson Electric Mfg. Co.,* 291 U. S. 386, 78 L. Ed. 859, 877 (1934): "[T]he proper party to recover the tax illegally exacted . . . is the person actually bearing the burden of the tax. . . ."

Thus, "*A taxpayer who has been otherwise compensated* for the taxes paid is not entitled to a refund thereof." 84 C. J. S. Taxation § 632.[14] (Emphasis in original.)

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[13]It is arguable that appellants did not even bear the legal incidence of the tax. The excise tax here is analogous to the liquor mark-up before the Court in *United States v. State Tax Comm'n of Mississippi,* 421 U. S. 599 (1975). The Court there held that the liquor mark-up, which was to be passed on to the purchaser, was legally imposed on the purchaser. *Id.* at 607-08.

[14]The foregoing principles have been followed in other cases. See for example, *State ex rel. Szabo Food Services, Inc. v. Dick-*

(Continued on following page)

It would be an anomoly indeed if the Appellants could obtain $100 million dollars of liquor tax revenues from Hawaii, which have been paid by others, and thereby throw the government of the State of Hawaii into a fiscal crisis.[15]

Assuming Appellants are entitled to have adjudicated the validity of the Hawaii Liquor Tax Law and that this Court found that the exemptions invalidated the entire law, still the Appellants are not entitled to the refund of approximately one hundred million dollars. As the foregoing cases illustrate, this would simply amount to a windfall and unjust enrichment at the expense of others who have, as a matter of economics, paid the tax. (See XI below.)

III. Because The Appellants Have Suffered No Damage As A Result Of The Limited Exemptions In Question, They Have Brought No Justiciable Case Or Controversy Before The Court For Adjudication And This Appeal Should Be Dismissed For Lack Of Jurisdiction.

(Continued from previous page)

inson, 286 S. 2d 529 (Fla. 1973); *W. F. Monroe Cigar Co. v. Dep't of Revenue,* 50 Ill. App. 3rd 161, 365 N. E. 2d 574 (1977); *Washington Plaza Assoc. v. State Bd. of Assessment Appeals,* 620 P. 2d 52 (Colo. App. 1980); *Consolidated Distilled Products, Inc. v. Mahin,* 56 Ill. 2d 110, 306 N. E. 2d 465 (1973), *appeal dismissed,* 419 U. S. 809 (1974); and *State v. Obexer & Sons, Inc.,* 660 P. 2d 981 (Nev. 1983).

[15]The question of whether Appellants are entitled to a refund was not passed on by the Court below. While this might pose a state question requiring remand, this Court in *Tax Comm'n of Mississippi,* stated at 421 U. S. at 609 n. 7:

> "[T]he duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern Limerick, Inc. v. Scurlock,* 347 U. S. 110, 121.

It therefore determined the legal incidence of the liquor mark-up although the question had not been decided by the Mississippi Courts.

Also, in an action to recover taxes, the burden is on the taxpayer to prove its claim.

Although not raised in the proceedings below, the jurisdictional issue can be raised in this Court and the action shall be dismissed if the Court lacks jurisdiction. *Tyler v. Judges of the Court of Registration*, 179 U. S. 405, 410 (1900); *Clark v. Gray, Inc.*, 306 U. S. 583, 588 (1939).

> Article III of the Constitution limits the 'judicial power' of the United States to resolution of 'cases' and 'controversies'. The Constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.' *Liverpool S.S. Co. v. Commissioners of Emmigration,* 113 U. S. 33, 39 (1885). The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights. . . .
>
> As an incident to the elaboration of this bedrock requirement this Court has always required that a litigants have 'standing' to challenge the action sought to be adjudicated in the lawsuit. The term 'standing' subsumes a blend of constitutional requirements and prudential considerations. . . .

Valley Forge, Inc. v. Americans United, Inc., 454, 471 U. S. 464, 757 (1982).

The party invoking the Court's jurisdiction must assert a claim of injury in fact and cannot rely on the potential legal claims of others to establish a case or controversy. *Id.* at 473. As otherwise stated in *Valley Forge,* quoting from *Frothingham v. Mellon,* 262 U. S. 447 at 488,

> "'The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . .'" *Id.* at 477.

See also *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U. S. 26, 37-38 (1976); *Aetna Life Ins.*

Co. v. Haworth, 300 U. S. 227, 240-241 (1937); *North Carolina v. Rice,* 404 U. S. 244, 246 (1971); *Ashwander v. Tennessee Valley Authority,* 297 U. S 288, 347-348 (1936) (Brandeis, J., concurring).

In order to raise the tax discrimination question at issue, the Appellants must show that they are affected unfavorably by the discrimination of which they complain. *Roberts and Schaefer Co. v. Emmerson,* 271 U. S. 50, 54, 55 (1926). *Bode v. Barrett,* 344 U. S. 583 (1953). In *Bode v. Barrett,* the court would not pass on a question of state tax discrimination under the Commerce Clause where ". . . [A]ppellants have failed to carry their burden of showing the tax deprives them of rights which the Commerce Clause protects. Cf. *Southern R. R. Co. v. King,* 217 U. S. 524, 534." 344 U. S. at 585. "Discrimination complained of can be attacked only by those discriminated against. This is a well-settled rule of Constitutional Law." 1 Cooley, Taxation § 367 (4th Ed. 1924). The fact that the issue is of great public importance doesn't save the case from mootness. *De Funis v. Odegaard,* 416 U. S. 312 (1974).

In their Complaints, the Appellants do not allege that the exemptions have injured them or shown that they have borne the economic burden of the tax. Without any showing of injury or damages, they have no standing to challenge the constitutionality of the Liquor Tax, including the exemptions in question. For this reason this appeal should be dismissed for lack of jurisdiction.[16]

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[16]The foregoing standing rules of the federal courts are followed by the Hawaii court. See *Territory of Hawaii v. Miguel,* 15 Haw. 402 (1907); *Territory of Hawaii v. Sakanashi,* 36 Haw. 661 (1944); *Cullifson v. Stainback,* 39 Haw. 67 (1951). These Hawaii cases require the plaintiff to show direct injury in regard to an alleged unconstitutional statute before being able to adjudicate its unconstitutionality.

IV. Even If The Appellants Have Standing And The Exemptions In Question Are Invalid, The Remainder Of The Hawaii Liquor Tax Law Should Be Upheld Because The Exemptions Are Severable From The Rest Of The Hawaii Liquor Tax Law.

The principle of severability is discussed at length in 2 *Sutherland Statutory Construction,* § 44 at 335-38 (4th Ed. 1973). The general principle of severability is stated as follows:

> . . . Statutes should be construed to sustain their constitutionality when it is possible to do so. The legislature is presumed not to intend the passage of an invalid act. No legislative action is to be declared unconstitutional except for clear and satisfactory reasons. The courts recognize a duty to sustain an act whenever this may be done by proper construction, and extend the duty to include the obligation to uphold part of an act which is separable from other repugnant provisions. (Footnotes omitted; citing *El Paso & Northeastern Ry. Co. v. Gutierrez,* 215 U. S. 87 1909).) Id. at § 44.01, 335-36.
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> . . .
>
> Judicial opinions are replete with avowals that separability is to be decided according to the legislative intent.
>
> The rule . . . applies in the case of a tax statute as well as in the case of any other statute.
>
> Unless it is impossible to avoid it, a general revenue law should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. *Id.* at § 44.03 at 338.

Citing 2 Cooley, *Taxation* § 495 (4th Ed. 1924); *Field v. Clark,* 143 U. S. 649 (1892).

In *Field v. Clark,* the Court noted at 696-97:

> . . . A different rule might be disasterous to the financial operations of the government, and produce

the most confusion in the business of the entire country.

In *United States v. Jackson,* 390 U. S. 570, 585 (1968), quoting from *Champlin Refining Co. v. Corporation Comm'n of Oklahoma,* 286 U. S. 210, 234, the Court further noted:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

In *Reitz v. Mealey,* 314 U. S. 33 (1941), the Court held severable an unconstitutional amendment to New York's driver licensing law providing for suspension of automobile driver's licenses. After referring [illegible] York case authority, the Court stated:

> There is no evidence of intent that if the amendments could not stand the legislation as a whole should fail. . . . Successive and frequent amendments have dealt with detail but have left intact the major features of the legislation.

314 U. S. at 39.

Hawaii applies the same general rules as to severability. In *Territory of Hawaii v. Hoy Chong,* 21 Hawaii 39 (1912) the Hawaii Supreme Court noted:

> Where the legislature has endeavored to accomplish a purpose by two distinct means the failure of one by reason of constitutional objections ought not to defeat the operation of the other. See In re *Fernandez,* 12 Haw. 120.
>
> ["] It is only when different clauses of an act are so dependent upon each other that it is evident that the legislature would not have enacted one of them without the other—as when the two things provided are

> necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and independency, the act will stand, though different parts of it are rejected." *Hunnington v. Worthen*, 120 U. S. 97, 102 "If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder." *Scott v. Flowers*, 61 Neb. 620, 623.

21 Hawaii 39 at 42-43.

In conformity with this judicial rule, the Hawaii legislature has enacted a general severability statute. Hawaii Rev. Stat. § 1-23. The underlying question as to severability here is whether the Hawaii legislature would have kept intact the liquor tax without the particular exemptions here challenged.

The liquor tax was originally enacted in 1939 as a tax on retail sales of liquor to defray increased costs of government due to liquor traffic. H. Stan. Comm. Rep. No. 305 on H. B. No. 436, enacted as 1939 Hawaii Sess. Laws 222; 1939 Haw. H. J. 1023. In 1949 the liquor tax was re-enacted in substantially its present form as a tax on the wholesale sale of liquor. The purpose of the bill was to increase revenue by increasing the tax rate and by increasing compliance by shifting collection to the wholesale distributors. The tax was re-enacted with the broad imposition language and the first five exemptions of the present statute. 1949 Hawaii Sess. Laws 343. In 1971, the exemption for okolehao was enacted in order to promote development of this Hawaiian liquor. 1971 Hawaii Sess. Laws 62. In 1976, this exemption was extended and the exemption

for fruit wines was added. For the years in question the sales exempted were sales of (1) liquor held for sale by a permittee but not yet sold, (2) liquor sold between permittees, (3) liquor not delivered or used in the state, (4) liquor for sacramental purposes, (5) liquor used for non-beverage purposes, (6) okolehao manufactured in the State between May 17, 1971 and June 30, 1981, and fruit wine manufactured in the state between May 17, 1976 and June 30, 1981. Appellants' Brief at 2-3.

If exemptions 6 and 7 are indeed unconstitutional, as contended by the Appellants, their invalidity should not be construed to invalidate the whole Liquor Tax Law. The fact that the Hawaii legislature by the exemption contained in (3) saved the general excise tax from any constitutional infirmities would support severability of the exemptions.

Also, the exemptions in question are not an integral non-severable part of the Liquor Tax Law. They were added as temporary amendments to the law years after its original enactment (see *U. S. v. Jackson*, 391 U. S. at 585-591). Elimination of the exemptions would not alter the statute's basic operation. While a Court may be reluctant to substitute its judgment for that of a legislative body in such a circumstance, it is inconceivable that the Hawaii legislature intended to rest the validity of the entire Hawaii Liquor Tax on the validity of exemptions that have no major significance. (See *Reitz v. Mealey*, 314 U. S. 33 at 39; *Boston Stock Exchange*, 429 U. S. at 337, n. 15). Thus, the exemptions in question are severable. If this Court should have any question as to their severability under Hawaii law, this case should be remanded for resolution of this issue. As noted in footnote 15 in *Boston Stock Exchange v. State Tax Comm'n*, 429 U. S. at 337, "Con-

struction of a savings clause is, of course, a question of state law appropriately decided by the state courts."

However, it is self-evident that the Hawaii legislature did not intend the validity of the liquor tax to turn on the validity of the limited exemptions in question.

V. A Decision In Favor Of The Appellants Should Not Be Applied Retroactively By The Court Because Of The Inequitable Results Of Retroactive Application And Because The Exemptions In Question Are Valid Under Prior Twenty-First Amendment Decisions Of This Court.

It is well established that this Court can apply its decisions prospectively. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971); *Linkletter v. Walker*, 381 U.S. 618, 629 (1965). As indicated in *Chevron*, in cases dealing with nonretroactivity the Court looks at the following three factors: (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the Court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) the inequity imposed by retroactive application, "'for [w]here a decision of this Court could produce substantial and inequitable results if applied retroactively there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'" 404 U.S. at 107.

In applying the first test the Court, in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) [see also *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, — U.S. —, 102 S. Ct. 2858, 2880 (1982)]

protected a party from the adverse consequences of relying on a prior decision of the Court.[17]

The Court has on numerous other occasions felt that the inequities, burdens and costs prevented retroactive application of its decision. It has applied its decisions prospectively where an election approving the issuance of revenue bonds was held unconstitutional as denying equal protection to the nonproperty owner taxpayers. The Court noted that significant hardship would be imposed on cities, bondholders, and others connected with the utilities if the decision was given retroactive application and bonds previously issued were declared void. *Cipriano v. City of Houna*, 395 U. S. 701, 706 (1969); *City of Phoenix v. Kolodziejski*, 399 U. S. 204, 213-14 (1970). In addition, the Court has applied its decision prospectively when nonpublic schools had relied on public funding and would experience serious financial consequences if they had to reimburse the public schools. *Lemmon v. Kurtzman*, 411 U. S. 192, 198-200 (1973).

Another example of where the Court has applied its decision prospectively is *Brown v. Board of Education*, 347 U. S. 483 (1954), 349 U. S. 294 (1955). In commenting on *Brown*, in *Quo Vadis, Prospective Overruling: A*

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[17]As stated therein "On the record in the instant case, the rule we announced today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so. That view was mistaken, and will not avail other litigants who rely upon it after today's decision. But we cannot say, in the face of the support given the view by respectable authorities, including the court below, that Appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action." 375 U. S. at 422, 423.

Question of Judicial Responsibility, 28 Hastings L. J. 533, 545 (1977), the author, Traynor, stated:

> Normally, State action that has been declared unconstitutional would be promptly terminated. Given the massive adjustment necessitated by the decision, however, the United States Supreme Court framed its decisions in terms of . . . 'with all deliberate speed' a phrase that enabled the Court to have the new rule take effect in slow motion.

Again in *Rosada v. Wyman,* 397 U. S. 397 (1970), the Court applied its decision prospectively, and gave New York time in which to change its welfare program to conform to federal requirements. The Court felt there was no discrete and severable provision whose enforcement could be prohibited and any incremental costs to the State to comply with the federal statute which was not being complied with would be massive. *Id.* at 421-22.

In *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation v. Norris,* — U. S. —, 103 S. Ct. 3492 (1983), the Court refused to apply its decision retroactively in which it held that it was unconstitutional for State employers to pay lower monthly retirement benefits to women. The Court applied the ruling prospectively since many other employer-sponsored pension plans were involved, and cost of complying would be excessive, and the cost would fall on the State.[18]

The loss of over $100 million dollars in liquor tax collections would result in an extreme hardship on the government of the State of Hawaii. In recent years, the total annual state tax collections and the total annual State

[18]The Court has also applied its decisions prospectively to allow Congress to rewrite improper legislation. *Northern Pipeline Const. Co. v. Marathon Pipeline Co.,* — U. S. —, 102 S. Ct. 2858 (1982).

budget has been just over $1 billion dollars. The loss would be borne by the general taxpaying public who have already paid the wholesale liquor taxes passed through by the wholesalers. It would be improper "to impose this magnitude of burden retroactively on the public." *Id.* at 3510. If any decision on the merits in favor of Appellants is applied retroactively, the Appellants would receive a windfall and they would be unjustly enriched at the expense of the general public.

A ruling on the merits in favor of Appellants would affect the liquor tax laws of many states.[19] There can be no doubt that the States in enacting these type of revenue measures pertaining to the liquor industry did so in accordance with this Court's interpretation of the Twenty-first Amendment.[20] Thus, if the progression of the law would require invalidation of any type of discriminatory taxes on the manufacture, sale, and distribution of alcoholic beverages, any such decision should be given only prospective application.

VI. The Presence Of The Limited Exemptions Of Okolehao And Pineapple Wine Does Not Result In The Hawaii Liquor Tax Law Denying The Appellants Equal Protection Of The Law.

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[19]The magnitude of the retroactive application of any decision by this Court which would invalidate the Hawaii Liquor Tax because of the limited exemptions in question is demonstrated by the fact that 31 states are listed in the *amicus curiae* brief of Distilled Spirits Counsel of the United States, Inc. as having some discriminatory beverage alcohol tax. DSCUS *Amicus* Brief at 2-5.

[20]As indicated in the portions of this brief dealing with the substantive issues, the Hawaii legislature and other state legislatures were relying on "respectable authorities" in assuming the validity of the limited exemptions under prior Twenty-first Amendment decisions of this Court. See *Miller Brewing Company v. State,* 284 N. W. 2d 353 (1979) and Note, *Economic Localism In State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment,* 72 Harv. L. Rev. 1145 (1959).

The Equal Protection issue was dealt with at some length in the opinion below. Jur. Stmt. App. A at A7-16. The Hawaii Liquor Tax is imposed in the same manner on all taxpayers engaging in any liquor business in Hawaii. The Hawaii legislature, to foster a local industry, could exempt certain liquor products from the excise tax without denying equal protection to anyone.

In *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232 (1890) the court held that the Equal Protection Clause was not designed to interfere with the power of the state to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity (*Id.* at 238). *Madden v. Kentucky*, 309 U. S. 83 (1940) upheld a discriminatory tax on bank deposits in out-of-state banks on the assumption that the tax would be harder to collect and administer from those banks than from the in-state banks (*Id.* at 528). *Allied Storage of Ohio v. Bowers*, 358 U. S. 522 (1959), upheld the exemption of property of nonresidents in storage even though like property of residents was subject to tax. *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 419-424 (1937) held it was constitutional for a state to discriminate between classes to equalize economic advantages, vis a vis their tax structure. In *Fernandez v. Wiener*, 326 U. S. 340, 360 (1945), the Court held that it was permissible for a state to classify community property interests for tax purposes.

In applying the equal protection standards to state taxing measures, this Court has held many times that it is concerned only with the practical operation and incidence of a tax rather than its definition or the precise form of descriptive words in determining its constitutionality. *Lawrence v. State Tax Comm'n*, 286 U. S. 276 (1932); *Wis-*

consin v. J. C. Penney Co., 311 U. S. 435 (1940); *Nelson v. Sears, Roebuck and Co.*, 312 U. S. 359 (1941); *International Harvester Co. v. Wisconsin*, 322 U. S. 435 (1944). It has further held that the validity of a state tax must be adjudged as applied. *Detroit v. Murray Corp. of America*, 355 U. S. 489 (1958). The legislature is entitled to address a current problem, and need not take into account new and hypothetical inequalities that may come into existence as time passes or conditions change. *Queenside Hill Realty Co. v. Saxl*, 328 U. S. 80 (1946). This Court in *Minnesota v. Cloverleaf Cream Co.*, 449 U. S. 456 (1981) noted in footnote 7 at 463, "In equal protection analysis, this Court will assume that the objectives articulated by the legislature are the actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.' See *Wienberger v. Wiesenfeld*, 420 U.S. 636-48, n. 16 (1975)." In *Carmichel v. Southern Coal Co.*, 301 U. S. 495 (1937), the Court sustained a tax with varying classifications saying, "A legislature is not bound to tax every member of a class or none." *Id.* at 509.

The foregoing cases and many others clearly demonstrate that the Hawaii legislature could enact the exemptions in question within the limits of equal protection. The basis of classification articulated by the Ha-Hawaii legislature alone justifies the classification here for equal protection purposes (see Jur. Stmt. App. A at A-13).[21] These exemptions did not deny Appellants equal

[21]The fact that the exemptions are for a limited period should be considered in reference to all of the constitutional arguments of the Appellants. In passing on the due process validity of zoning restrictions, Courts have held that the prevention

(Continued on following page)

protection of the laws. Neither did they operate to discriminate against any other liquor products.

VII. The Exemptions Of Pineapple Wine And Okolehao Are Not Invalid Under The Commerce Clause Because They Were Enacted To Promote A Local Industry And In Their Practical Operations They Did Not Discriminate Against Interstate Or Foreign Commerce Or Otherwise Impede The Free Flow Of Commerce.

A state tax will be struck down under the Commerce Clause only if in practical operation and effect it significantly adversely effects or discriminates against interstate or foreign commerce. The general principles are set forth in *Lewis v. BT Investments Managers, Inc.*, 447 U.S. 27 (1980). The Court there noted that the Commerce Clause "limits the power of the States to erect barriers against interstate trade." (*Id.* at 35); but that

> This limitation upon state power, of course, is by no means absolute. In the absence of conflicting federal legislation, the States retained authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected. See, *e.g., Raymond Motor Transportation Co., Inc. v. Rice,* 434 U.S. 429, 440 (1978); *Great A & P Tea Co. v. Contrell,* 424 U.S. 336, 371 (1976). (*Id.* at 36). Where such legitimate local interests are implicated, defining the appropriate scope for state regulation is often a matter of 'delicate adjustment.' Id., quoting *H. P. Hood and Sons, Inc. v. Dumond*, 336 U.S. at 533 (Black, J., dissenting.

Id. at 35-36.

(Continued from previous page)

of development for a limited time for controlled growth does not deny a developer due process of law where a permanent restriction would do so. *Arverne Bay Const. Co. v. Thatcher,* 278 N. Y. 222, 15 N. E. 2d 587 (1938); *Golden v. Town of Ramapo,* 303 N. Y. 2d 359, 334 N. Y. S. 2d 138, 285 N. E. 2d 291 (1972), *appeal dismissed* 409 U. S. 1003 (1972).

The foregoing was reaffirmed by this Court in *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981) wherein it further discussed the Commerce Clause question:

> When legislating in areas of legitimate local concern . . . States are nevertheless limited by the Commerce Clause. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945). If a state law purporting to promote environmental purposes is in reality 'simply economic protectionism,' we have applied a 'virtually *per se* test of invalidity.' *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). Even if a statute regulates 'even handedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Moreover, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'

449 U.S. 456 at 471 (footnote 15 omitted).

In footnote 15, the court stated in *Cloverleaf*, "A court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory effect, see *Philadelphia v. New Jersey*, or of discriminatory purpose, see *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. at 352-53." In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Court noted that the protection of local growers is a legitimate state interest and is constitutional (*id.* at 143) even though it incidentally affects interstate commerce. *Id.* at 142.

For purposes of further analysis here, the following precepts set forth in *Maryland v. Louisiana*, 451 U.S. 725 (1981) are significant:

> One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). This antidiscrimination principle 'follows inexorably from the basic purpose of the Clause' to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra.* See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

Id. at 754.

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).

Id. at 756.

The first part of the foregoing quotation sets forth the Commerce Clause standard which no one disputes. The second part deals with the application of that standard in a particular case. In the second part, the Court states that the state tax must be assessed in light of its *actual effect* and further that it is the Court's duty to determine whether the tax in its *practical operation* would work *discrimination against interstate commerce.*

In viewing the effect of the Liquor Tax Law, including the limited exemptions contained therein, this Court

should give deference to the factual findings and conclusions of the Hawaii Supreme Court. See *Container Corp. of America v. Franchise Tax Bd.*, — U. S. —, 103 S. Ct. 2933, 2945-46 (1983). The Hawaii Supreme Court found:

> (1) Hawaii's tax on wholesaling activity applies to all liquor wholesalers engaged in business in the State. It touches all local sales and uses of liquor produced in foreign countries, in the mainland States, and in Hawaii, with the exception of okolehao and pineapple wine. There is absolutely no indication that it has been applied selectively to discourage imports in a manner inconsistent with foreign policy. Nor is there a scintilla of evidence that it has the effect of a protective tariff or that it has any effect on the demand for imported liquor.

Jur. Stmt. App. A at A-21 (footnotes omitted).

> (2) "Okolehao and pineapple wine are not the only alcoholic beverages produced in Hawaii. Also produced here are fruit liquers and sake, a Japanese-type wine."

Id. at A-37, fn. 15. (Premo beer was also produced in Hawaii for some of the years in question; See Appendix A.)

> (3) The legislature's reason for exempting 'Ti root okolehao' from the 'alcohol tax' was to 'encourage and promote the establishment of a new industry,' S. L. H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of 'fruit wine manufactured in the State from products grown in the State' was intended 'to help' in stimulating the local fruit wine industry.' S. L. H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056.

Id. at A-3. The Hawaii Supreme Court then looked at the Hawaii tax to determine whether it "falls short of the substantially even-handed treatment demanded by the Commerce Clause . . . *Boston Stock Exchange v. State Tax*

Comm'n, 429 U. S. 318, 332 (1977)." *Id.* at A-21. It concluded that "the taxpayers have failed to demonstrate that the Hawaii Liquor Tax in its practical operation works discrimination against interstate commerce." *Id.* at A-30 (footnote omitted).

In support of this conclusion, the Hawaii Supreme Court noted: (1) "We also have good reason to believe that neither okolehao [nor] pineapple wine is produced elsewhere." *Id.* fn. 20 at A-39. (2) "Though the taxpayers submitted no evidence on the amount of okolehao and pineapple wine sold in Hawaii, we believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii."[22] *Id.* fn. 21 at A-39.

The Appellants do not challenge any of the foregoing conclusions of the Hawaii Supreme Court. Nevertheless, by reliance on *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), and comparable "protectionist *per se* cases" which were distinguished by the Hawaii Supreme Court in its decision (Jur. Stmt. App. A at 25-30), they contend that the Liquor Tax Law is invalid *per se* as protectionist legislation. However, they concede on

[22]As indicated in Appendix A, these exemptions for the year 1976 amounted to .22 of one percent of liquor sales in Hawaii and 3.7 percent of total sales of Hawaiian manufactured liquor products. In the year 1977 these figures are .24 of one percent and 5.76 percent respectively, and for 1978 .32 of one percent and 8.6 percent respectively. Given the stated legislative purpose and the foregoing figures as of 1976 (the date of enactment of the exemptions in question), it is evident that the exemptions in question constituted a subsidy program to get a local industry on its feet, and that any potential burden on interstate or foreign commerce was incidental in nature.

page 20 of their Brief that this Court will consider the law's practical effect and relative burden on commerce where (1) legitimate state objectives are credibly advanced, (2) there is no patent discrimination against interstate trade, and (3) the effect on interstate commerce is incidental. As heretofore indicated, there is here a legitimate state objective credibly advanced; there is no patented discrimination against interstate commerce; and any impact of the exemptions on interstate or foreign commerce is clearly incidental.[23]

The protectionist *per se* cases relied on by Appellants are simply that and nothing more. In each case the state was trying to enhance thriving and substantial business enterprises at the expense of any foreign competitors.[24]

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[23]We agree with the Appellants' statement on page 21 of their Brief that the Commerce Clause question here relates to discrimination against products. At this juncture, Appellants' case totally fails unless they can establish, which they have failed to do and cannot do, that the okolehao and pineaple wine exemptions discriminate against products (beer and grape wine) which they import into Hawaii.

[24]These cases are readily distinguishable from the present case. See IX. and X. below. If Appellants' argument is correct, any state tax policy that in any way attempts to encourage local business, would of necessity have to fall by the wayside. In some immeasurable way, any such state tax policy could impact interstate and foreign commerce. Yet, even in these strictly protectionist cases it is not the parochialism of the states and their policies that is at issue. It is the impact of the policies on the free flow of commerce and trade that is at issue. Here there simply is no adverse impact on commerce because of the peculiar and limited nature of the exemptions. That being the case, all of the authorities relied upon by the Appellants, irrespective of how Appellants would characterize Hawaii's exemptions in question, entitle Appellants to no relief. This Court has never held that a protectionist policy by the states is *per se* invalid if there is not demonstrated an impact on the free flow of trade and commerce. See *Arkansas Electric Coop. Corp. v. Arkansas Public Comm'n*, — U. S. —, 103 S. Ct. 1905 (1983)

(Continued on following page)

The foregoing conclusions in regard to the Commerce Clause are supported by recent subsidy cases of the Court and the authority granted the states to control liquor traffic under the Twenty-first Amendment (for Twenty-first Amendment analysis see IX. below). The recent local subsidy cases of this Court, *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794 (1976); *Reeves, Inc. v. Stake,* 47 U. S. 429 (1980); *White v. Massachusetts Counsel of Constr. Employers,* — U. S. —, 103 S. Ct. 1042 (1983) uphold the states' right in their propriety capacity to promote local industry.

Alexandria Scrap upheld Maryland's effort to control its environment even though Maryland discriminated against outstate processors of junked automobiles. The substance of Maryland's regulation was to subsidize local scrap industries to rid the environment of junk automobiles. In regard to this effort the Court noted:

> We do not believe the Commerce Clause was intended to require independent justification for such action. Maryland entered the market for the purpose agreed by all to be commendable as well as legitimate, of protecting the State's environment. As a means of furthering this purpose, it elected the payment of state funds—in the form of bounties—to encourage the removal of automobile hulks from Maryland streets and junkyards.

Id. at 809.

Significantly, Justice Stevens, in a concurring opinion in *Alexandria Scrap* noted:

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where the Court noted that formalistic distinctions are no longer controlling in defining the limits of state power under the Commerce Clause. Cf. *Seagram & Sons, Inc. v. Hostetter,* 384 U. S. 35 (1966) where the Court refused to infer discriminatory effects on New York's regulation of liquor prices.

> This case is unique because the commerce which Maryland had 'burdened' is commerce which would not exist if Maryland had not decided to subsidize a portion of the automobile's scrap-processing business.

Id. at 815.

> Nor in my judgment, does that Clause inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.

Id. at 816.

Alexandria Scrap is consistent with the earlier case of *Parker v. Brown*, 317 U. S. 341 (1943). *Parker* upheld California's efforts to correct the evils attending the in-state production and marketing of raisins.

Reeves upheld the power of South Dakota, consistent with the Commerce Clause, to confine the sale of cement which was produced in a state owned plant solely to its residents on authority of *Alexandria Scrap*. As noted in *Reeves*, there is a Commerce Clause difference between states as market participants and states as market regulators. In *Reeves*, the petitioner advanced the protectionist *per se* argument. This Court rejected that argument in footnote 16 of the Opinion (447 U. S. at 442) and commented on it in the text of the Opinion:

> We find the lable 'protectionism' of little help in this context. The State's refusal to sell to buyers other than South Dakotans is 'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. . . . Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patent unobjectionable purpose

of State government—to serve the citizens of the State.

(*Id.* at 442.)

The foregoing 'subsidy cases' (*Alexandria Scrap; White;* and *Reeves*) closely parallel the case at bar. The Hawaii legislature in its proprietary capacity was attempting to subsidize nonexistent (pineapple wine) and financially troubled (okolehao) liquor industries peculiar to Hawaii by enacting the exemptions. Exemption of these products had no real or potential impact on the importation of liquors into Hawaii.

Exxon Corp. v. Governor of Maryland, 437 U. S. 117 (1978) in which this Court found no discrimination against out-of-state goods, clearly controls this case. In *Exxon* this Court disposed of any interstate commerce discrimination argument by reference to the particular facts before it:

> Plainly, the Maryland statute does not discriminate against interstate goods, nor does it favor local producers or refiners. Since Maryland's entire gasoline supply flows in interstate commerce and since there are not local producers or refiners, such claim of disparate treatment in interstate and local commerce would be meritless.
>
> . . . [T]he fact that the burden of divesture requirements falls totally on interstate companies . . . does not lead, either logically or as a practical matter, to a conclusion that the state is discriminating against interstate commerce at the retail level.

437 U. S. 117 at 125.

> . . .
>
> In the absence of a relevant Congressional declaration of policy, or a showing of a specific discrimination against, or burdening of interstate commerce, we

> cannot conclude that the states are without power to regulate in this area.[25]

Id. at 129.

In the case at bar, no interstate or foreign commerce has been affected because Appellants have not imported okolehao and pineapple wine or competing products into Hawaii. Furthermore, the Appellants were free to produce or to buy such products upon the local Hawaii market and wholesale them. If there is no discrimination as a matter of fact, there can be no discrimination as a matter of Constitutional law.

VIII. The Exemptions In Question Are Not Invalid Under The Import-Export Clause Because (1) The Liquor Tax Is Imposed On A Sale After Importation; (2) It Is Expressly Permitted By 27 U. S. C. § 121 As Interpreted In De Bary v. Louisiana, 227 U. S. 108 (1913) And Department of Revenue v. James Beam Co., 377 U. S. 341 (1964); (3) It Conforms To The Standards Of Michelin Tire Corp. v. Wages, 423 U. S. 276 (1976); And (4) The Exemptions Do Not Discriminate Against Or Burden Foreign Commerce.

The Commerce Clause analysis in Section VII. of this brief is equally applicable here as to whether the exemptions burden or discriminate against foreign commerce. As there indicated, they do not do so.

The Appellants' Import-Export Clause argument is based solely on the untenable premise that the Hawaii Liquor Tax Law "is imposed on imports on the basis of

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[25]In *United States Brewers Ass'n, Inc. v. Healy,* 532 F. Supp. 1312, 1323 n. 42 (D.C. Conn. 1982), the Court discusses the protectionist *per se* rule relied upon by the Appellants. It there noted that: "Invariably the Court infers discriminatory *purpose* only when there is a prior finding of discriminatory impact." (Emphasis original.)

their foreign origin." Appellants' Brief at 27. Nothing could be further from the truth. This tax is imposed on all liquor sales irrespective of their origin. It includes sales of domestic liquors as well as sales of imported liquors except for the two minor exemptions at issue. As above indicated, when initially enacted in 1939 the law contained no exemptions. The Hawaii Liquor Tax is not like the taxes invalidated in *Beam* and *Cook v. Pennsylvania*, 97 U. S. 566 (1878) which discriminated against imports because of their foreign origin. The tax in *Beam* was an *ad valorem* tax on importation. The tax in *Cook* was on the auction of imported goods. The tax here is the same as the tax upheld in *Consolidated Distilled Products v. Mahin*. The Illinois Supreme Court there held that the Illinois Liquor Tax on the wholesale sale of imported goods was not in violation of the Import-Export Clause because the tax was not "upon the importation of liquor." (See 306 N. E. 2d 465 at 466.)

The Court in *De Bary* held that the Import-Export Clause was inapplicable to intrastate sales of liquor after the importation was completed. In *James Beam Co.*, the Court held that the Wilson Act (27 U. S. C. § 121) and *De Bary* were still good law and that a tax on the business of *selling* foreign liquor was permissible whereas a tax on the *importation* was not. 337 U. S. at n. 7, 345-46.

Nor does the liquor tax conflict with *Michelin*. The exemptions do not interfere with exclusive federal regulation of foreign commerce; they were not enacted to and do not in fact discourage importation of foreign liquor into Hawaii; and there was no impact on federal revenues from Imports or Exports.

IX. Any Constitutional Restriction, (Commerce Clause, Import-Export Clause Or Equal Protection Clause) On A State's Power To Regulate Or Tax Intoxicating Liquors

Must Be Considered In Conjunction With The Authority Granted The States Under The Twenty-First Amendment; And, When So Considered, It Is Clear That The Protectionist Per Se Rule Relied On By The Appellants Is Not Controlling, But That The Interest Of Hawaii In Regulating Or Taxing The Liquor Industry Must Be Balanced Against The Actual Effect Of Such Regulation Or Taxation On Interstate Or Foreign Commerce.

A note entitled *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors,* 75 Colum. L. Rev. 1578 (1975), sets forth the history of the case law concerning the relationship of the Twenty-first Amendment to other Constitutional restrictions. As there noted, two views have been enunciated by this Court concerning the relationship of the Twenty-first Amendment to that of other constitutional provisions. The first view is that the States have absolute authority over liquor traffic within their borders because the language of Section 2 expressly so provided.[26]

This absolutist view was departed from in *Department of Revenue v. James B. Beam Distilling Co.,* 377 U. S. 341 (1964). In *Beam* the Court prohibited Kentucky from imposing an import tax on whiskey in conflict with the Import-Export Clause. However, *Beam* was limited:

> We have no doubt that under the Twenty-first Amendment, Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's prelim-

[26]This view was expressed in *State Board of Equalization v. Youngs Market Co.,* 299 U. S. 59 (1936); *Mahoney v. Joseph Trineir Corp.,* 304 U. S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U. S. 391 (1939), and *Joseph F. Finch & Co. v. McKittrich,* 305 U. S. 395 (1939).

> inary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay this impost on these imports from abroad.

337 U. S. at 346. The Twenty-first Amendment is particularly significant in the context of Commerce Clause restrictions on state powers. Section 2 has its roots in the Wilson Act, 27 U. S. C. § 121, and the Webb-Kenyon Act, 27 U. S. C. § 122. These statutes took intoxicating liquors out of the reach of the Commerce Clause by withdrawing the immunity of interstate commerce from the shipments of liquor into and across state lines. *Clark Distilling Co. v. Western Maryland R. R. Co.*, 242 U. S. 311, 322-23 (1917). By incorporating these statutes into the Twenty-first Amendment, Commerce Clause powers were constitutionally restricted as to intoxicating liquors. As noted in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964):

> Both the Twenty-first Amendment and the Commerce Clause are part of the same Constitution. Like other provisions of the Constitution each must be considered in the light of the other and in the context of the issues and interests at stake in any concrete case.

Id. at 322. Even though under the Commerce Clause a state regulatory statute's facial discrimination against interstate commerce may itself be a fatal defect, *Hughes v. Oklahoma,* 441 U. S. 322, 336-37 (1979), it would be improper to view the issues and interests pertaining to liquor traffic only under the standards of the Commerce Clause just as it would be improper to view the same only in terms of the Twenty-first Amendment.

The Court, after reviewing many of its prior Twenty-first Amendment cases, concluded in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum*, 445 U. S. 97 (1980):

> These decisions demonstrate that there is no bright line between federal and state powers over liquor. . . . Although States retain substantial discretion to establish . . . liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.' *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. at 332.

445 U. S. at 110.

In *United States v. State Tax Comm'n of Mississippi*, 421 U. S. 599 (1975) this Court denied the authority of Mississippi to regulate or tax the importation of liquor into federal bases under exclusive federal jurisdiction. In declining to decide whether Mississippi's taxing regulation was valid as to nonexclusive federal bases, the Court necessarily gave effect to additional authority granted the states under the Twenty-first Amendment which would have been denied them under the Commerce Clause. *Accord: Seagram & Sons, Inc. v. Hostetter*, 384 U. S. 35 (1966).

It is thus well settled that a state may levy taxes on the importation or sale of liquor from other jurisdictions under the Twenty-first Amendment, free of Commerce Clause and equal protection clauses, so long as there are no competing federal interests founded on other provisions of the U. S. Constitution which outweigh the state's interest. ***State Board v. Young's Market Co.; Department of Revenue v. James Beam Co.; Hostetter v. Idlewild Liquor Corp.; California Retail Liquor Dealers Assoc. v. Mid-***

cal Aluminum. Under authority of the Twenty-first Amendment this Court has consistently allowed and upheld (1) discriminatory taxation of liquor produced in other states, and (2) direct burdens on interstate commerce of liquor, against Commerce Clause and equal protection clause attack. *State Board v. Young's Market Co.,* 299 U. S. 59 (1936); *California v. Washington,* 358 U. S. 64 (1958). Under the authority of the Twenty-first Amendment many states have enacted tax laws which discriminate against liquor produced in other states. *Amicus* Brief of DSCUS at 2-4 and DSCUS Appendix of Statutes.

It is not uncommon for a state statutory regulation, which is facially discriminatory against interstate commerce, to be upheld because either Congress consented to the state's action in the area, or another constitutional provision restricts the operation of the Commerce Clause. In *Prudential Ins. Co. v. Benjamin,* 328 U. S. 408, 421-27 (1946), Congress exempted insurance companies from the Sherman Anti-Trust Act and gave the states sole power to regulate the insurance industry. The Court upheld a South Carolina statute which taxed foreign insurance companies at three percent of annual premiums, but did not tax domestic insurance companies. This does not differ in substance from *Clark Distilling Co. v. Western Maryland R. R. Co.,* 242 U. S. 311 (1917) (Webb-Kenyon Act); *Board of Equalization v. Young's Market Co.,* 299 U. S. 59 (1936) (Twenty-first Amendment).

Given the history of this Court's interpretation of the Twenty-first Amendment and the Wilson Act and the Webb-Kenyon Act that preceded it, the Appellants must at least establish that the exemptions in question have a serious impact on interstate or foreign commerce. In

fact, the Twenty-first Amendment decisions of this Court to date would uphold the exemptions in question even though they had a significant impact on interstate or foreign commerce. However, the Court need not reach that issue here since the peculiar Hawaii products at issue have never impacted either interstate or foreign commerce and they were exempt to promote a legitimate state interest. Therefore, this Court's decision in *Exxon Corp.* is dispository of any discriminatory Import-Export Clause, Equal Protection Clause or Commerce Clause issue.

X. There Is No Merit To The Argument Of Appellants And Their Amici That The Protectionist Per Se Rule Controls The Disposition Of This Case.

There are several reasons why the protectionist *per se* Commerce Clause rule here is not controlling.

First, the exemptions in question were not enacted to discriminate against foreign products, but rather, to promote a local industry. (See Appellants' Brief at 4-6 and Jur. Stmt. App. A at A-12-13.) In renewing the exemption for okolehao in 1971, the House Standing Committee of the Hawaii Legislature reported:

> Testimonies were received that over the past decade well over a million dollars has been lost attempting to create a significant market for Ti root okolehao, fabled in song and legend as Hawaii's own spirit product. Once before, in fact, the industry similarly requested, and the legislature granted, a five year period of exemption which has since expired. . . .
>
> It is hoped by industry that the tax that is temporarily saved by this relatively new and expanding business may be channeled into national promotion and competitive pricing, the result of which is a linking of okolehao to Hawaii as Tequila is to Mexico. Even with the anticipated expanded sales, it is

> expected that the total annual tax otherwise due on okolehao sales would amount to less than $15,000 per year. Relief is not sought from the general excise tax.
>
> Considering the jobs this industry creates and the prospect presented by proper promotion of its product, your Committee believes that the tax revenue loss is nominal only compared with the benefit, particularly when reviewed in light of the thousands of dollars appropriated annually by the state in matching funds to promote other products grown and manufactured in Hawaii. Thus, the benefit to this industry (and the state) is by parity if not in kind.

1971 H. J. Stand. Comm. Rpt. 246 on H.B. No. 588 at 793-94.

This expresses an intent by the Hawaii legislature to subsidize a new industry peculiar to Hawaii with no intent of erecting a trade barrier or a discriminatory tax system against non-Hawaiian liquor products. By these exemptions, Hawaii entered the local market to help a local industry. Hawaii could have acccomplished the same result by imposing the excise tax without the exemptions and granting nominal subsidies to the local okolehao and pineapple wine industries.

Secondly, the protectionist *per se* cases are readily distinguishable from this case. The objective of the Hawaii legislature in enacting the exemptions in question was not the objective sought by New York in enacting the discriminatory tax struck down in *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). The legislation there was specifically intended to promote the New York Stock Exchange *at the expense of* stock exchanges in other states.

The same is true of the statutes before the Court in *H. P. Hood & Sons, Inc. v. DuMond*, 336 U. S. 525 (1949)

and the cases analyzed therein. In *Hood*, New York again specifically tried to use its police powers to curtail competition in the local market. The Court there noted, by reference to its prior decisions, the

> "broad power in the State to protect its inhabitants . . . . . even by use of measures which bear adversely upon interstate commerce. But it laid repeated emphasis upon the principle that the state may not promote its own economic advantages by curtailing or burdening of interstate commerce." *Id.* at 531-32.

(The Court was referring generally to *Baldwin v. Seelig*, 294 U.S. 511 (1935).

In the *Boston Stock Exchange* case, the Court concluded:

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. . . . We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

429 U.S. at 336-37.

In *Maryland v. Louisiana*, 451 U.S. 725 (1981) relied upon by the Appellants, this Court struck down the Louisiana tax scheme there involved because competitive users in other states were burdened with the tax while domestic users were not. (*Id.*) There this Court noted, however, that

> [a] State tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).

Id. at 756.

Even apart from Twenty-first Amendment considerations, the Court has never applied the protectionist *per se* rule in the mechanical way that Appellants assert it should be applied here. The actual effect of the state's regulatory or tax scheme on interstate or foreign commerce must be considered. Since the products in question were exempt for a limited time and are unique to Hawaii and have no impact on interstate or foreign commerce, there is no substance to either Appellants' Commerce Clause or Import-Export Clause arguments. Invalidity of their *per se* protectionist argument can be demonstrated by hypothetical circumstances which is very close to the truth. Assume that there was no production for the period in question of any okolehao or fruit wines in Hawaii. Under these circumstances would the Hawaii Liquor Law be declared unconstitutional because of the exemption of these products? The answer is obviously no.

Thirdly, the protectionist *per se* rule, as relied on by appellants ignores the balancing required under the Twenty-first Amendment. In discussing the Twenty-first Amendment at pages 30-40 of their Brief, the Appellants admit that the states are given authority to control liquor traffic in a manner which would be prohibited by the Commerce Clause alone. At page 36 of their Brief, the Appellants note "the consideration of the issues involved in a given case must address the relationship of the assertive state interest to the core importation purpose of Section 2, and avoid *undue impairment of federal interests.*" (Emphasis added.) And at page 38, "The Court's opinions have not adapted any hard and fast rule to identify the scope of the respective federal and state powers. Instead, the Court has required that the Twenty-first Amendment and the Commerce Clause be read and considered together and *the is-*

sues presented by the competing interests they represent addressed in a practical way." (Emphasis added.) In an effort to circumvent the Twenty-first Amendment limitations on the Commerce Clause restrictions the Appellants simply assert that "Hawaii can articulate no legitimate state interests because the tax is based solely on the forbidden purpose of fostering local industry at the expense of foreign and interstate commerce." (Appellants' Brief at 39.) This statement is wrong as a matter of fact. The exemptions have not been granted "at the expense of foreign and interstate commerce". While the Appellants note that discrimination is in regard to products (Appellants' Brief at 8, 21), they completely ignore the fact that no products in competition with the peculiar Hawaiian products of okolehao and pineapple wine were imported into Hawaii for the years in question.

In the *Amicus Brief* of the Wine Institute it is recognized that the states are free to promote local industry by subsidies (Wine Institute Brief at 10, n. 13). However, the Wine Institute fails to note that the same objective with the same impact on interstate commerce could be accomplished by a tax exemption. The Wine Institute, then, after arguing that the protectionist *per se* rule is controlling, considered the Twenty-first Amendment and stated:

(1) "And, of course, *Idlewild* and *Midcal* both held that a balancing analysis was appropriate in cases where state liquor laws are challenged under the Commerce Clause." (Wine Institute Br. at 16);

(2) The Twenty-first Amendment did not "encompass authority to promote a local liquor industry by discriminating between in-state and out-of-state producers." (*Id.* at 18);

(3) The Webb-Kenyon Act ". . . was not intended to confer and did not confer upon any state the power to make *injurious discriminations against the products of other states* which are recognized as subjects of lawful commerce by the law of the state making such discriminations." (*Id.* at 22; emphasis added.)

(4) "This history of the Twenty-first Amendment reinforces the appropriateness of the balancing approach the court has developed in the *Idlewild/Midcal* line of cases . . . whatever powers the states may have in this area, the Twenty-first Amendment was not added to the Constitution to permit the states to promote local producers of alcoholic beverages at the expense of producers located elsewhere." (*Id.* at 25.)

Thus, the Wine Institute admits that a state statute to be invalid must in fact work a discrimination against out-of-state liquor or out-of-state producers of liquor. Furthermore, there must be a balancing of the state's interest to promote the local industry as against the impact on interstate or foreign commerce. This clearly requires the Appellants to rely on something more than a protectionist *per se* rule and completely undermines their position. The Commerce Clause and Export-Import Clause restrictions are not violated unless there is, in fact, discrimination. This is particularly true when these Clauses are considered in light of the Twenty-first Amendment.

The erroneous nature of the Appellants' argument may be illustrated by a syllogism.

Major Premise: Hawaii has exempted two products from its liquor tax.

Minor Premise: Hawaii cannot do so at the expense of interstate or foreign commerce.

Conclusion: Therefore, the Hawaii Liquor Tax Law unconstitutionally discriminates against interstate or foreign commerce.

Obviously, the Conclusion does not follow from the major and minor premises. There is simply nothing to support the Conclusion that the exemptions have the effect of burdening or discriminating against interstate or foreign commerce. In the last analysis, the Appellants' arguments are based on unsupportable factual and legal assumptions.

XI. Even If The Hawaii Liquor Tax Is Held Invalid This Decision Is Not Limited To Prospective Application, Appellants Have No Right To Receive A Refund Because They Have Not Borne The Economic Burden Of The Tax And Therefore Refunds Would Unjustly Enrich Them.

We wish to emphasize here that, even if the Appellants have standing to adjudicate the validity of the exemptions in question or of the Hawaii Liquor Tax Law, still they are not entitled to receive refunds over $100 million dollars in liquor taxes paid. As indicated in I and II above, the Appellants are entitled to no relief because they have not borne the economic burden of the Hawaii Liquor Tax. Appellants have added on the amount of liquor tax to the normal wholesale selling prices of their liquors (J.A., at 9, 15 and 22). Pursuant to Hawaii Rev. Stat. § 244-5 (see Appendix C), Appellants have stated the amount of the liquor tax as a separate part of the wholesale selling price charged to liquor retailers. By separately stating the amount of liquor tax, the liquor retailer becomes responsible for promptly remitting to the Appellant wholesalers the entire amount of the liquor tax or face severe penalties, including suspension of his retail liquor license. Hawaii Rev. Stat. § 281-83. (See Appendix

C.) It cannot be clearer from the facts and from Hawaii's liquor tax structure that Appellants have passed on the entire amount of the liquor tax and have not borne any part of the economic burden of the tax.

When a taxpayer claiming a refund has not borne the economic burden of the tax, the general rule is that the taxpayer is not entitled to a refund on the grounds of unjust enrichment.[27] The principal exception to this rule appears where the taxpayer refunds or is under contract to refund the tax to the purchasers or consumers who ultimately paid the tax, in which case there is no unjust enrichment. 119 ALR 542 (1939) *anno*: "Right as between dealer and taxing authorities in respect of taxes illegally collected." In this case, where Appellants have not refunded the tax and have no contract or agreement to refund the tax to the consumers, Appellants have no right to receive a windfall of over 100 million in tax collections paid by other persons.

In *State v. Obexer & Son, Inc.*, 660 P. 2d 981 (Nev. 1983), the Court had before it the question of whether Obexer (the taxpayer) was entitled to refund of taxes which it paid the State but collected from its customers. In denying Obexer a refund, the Court noted:

> Actions to recover taxes paid are equitable in nature and the burden of proof is on the taxpayer to show that the taxing body holds money that in equity and good conscience it has no right to retain.
>
> . . .
>
> If the taxpayer making the claim has collected the tax from his customers, he has suffered no loss or injury, and is not entitled to a credit or refund even if the tax was paid erroneously.

660 P. 2d at 984. (Footnotes omitted.)

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[27]See II above at 10-12 and cases cited therein.

> Thus, Obexer was merely a conduit for the revenue, and would be unjustly enriched if the State were forced to return to it all of the taxes that it collected from its Nevada customers.

Id. at 985.

In *Consolidated Distilled Products v. Mahin,* 306 N.E. 2d 465 (Ill. 1974), the Illinois Supreme Court held that regardless of whether the Illinois liquor tax imposed on importing distributors was invalid because of discrimination between native wine and wine produced elsewhere, the importing distributors were not entitled to a refund on the grounds of unjust enrichment.

> "The general policy against unjust enrichment . . ., leads us to the conclusion that the plaintiff distributors do not have a right to a refund. That the plaintiffs remitted the tax is not alone determinative. There has been no showing that they bore the burden of the tax. The only proof that bears upon that question is the stipulation that has been quoted, and that shows, or tends to show, that they passed the tax on to the retailers to whom they sold. Certainly it does not show that the plaintiff distributors bore the tax. The fact that the tax was not separately stated in the transaction between the plaintiffs and the retailers to whom they sold is not determinative." at 469-470.

It should be noted that in *Consolidated Distilled Products,* the court held that intervenor liquor consumers also were not entitled to refund of the tax collected. "[W]e agree with the trial judge that there was no adequate showing that the burden of the tax was transmitted through the retailers, with whom alone a distributor may deal, to the ultimate consumers. The intervenors have not shown that they bore the burden of the tax."

In this case, there are no intervenor liquor consumers, no showing has been made that the liquor consumers bore the burden of the tax, and the issue of refund to the liquor consumers has not been raised.

For these reasons, the Appellants are barred from receiving a windfall refund of over $100 million on the grounds of unjust enrichment, regardless of whether the tax is invalid. In practical effect, a decision of this Court holding the tax invalid can only have prospective application.

CONCLUSION

For the reasons set forth herein, this Cause should be dismissed for lack of jurisdiction; or the decision of the Hawaii Supreme Court should be affirmed. Alternatively, if this Court should consider the merits and decide that the exemptions (which have expired) can no longer be justified, it should give the decision only prospective application and hold that the exemptions are severable from the remainder of the Hawaiian Liquor Tax Law or remand this issue to the Hawaii Supreme Court for resolution.

Respectfully submitted,

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APPENDIX A

COMPUTATION OF PERCENTAGE OF OKOLEHAO AND FRUIT WINE SALE TO TOTAL SALES

	1976	1977	1978	1979	1980	1981
Okolehao Sales	170,292.45	206,231.44	235,204.71	149,588.84	73,007.39	36,969.74
Fruit Wine sales	-0-	1,166.00	60,140.26	138,868.93	187,143.81	343,656.93
TOTAL	170,292.45	207,397.44	295,344.97	288,457.77	260,151.20	380,626.67
Total Liquor Sales	76,659,014.	86,229,026.	93,560,204.	88,858,525.	42,690,672.	49,181,708.
Liquor Sales— Total Exemptions / Total Liquor Sales =	.2221%	.2405%	.3157%	.3246%	.6094%	.7739%
Loss Revenue Due to Exemption Liquor Tax at 20%	34,058.49	41,479.49	59,068.99	57,691.55	52,030.24	76,125.33
Liquor Sales— Total Exemptions / Total Sales of Hawaiian Manufactured Liquors =	3.7%	5.76%	8.6%	20.3%	45.6%	52.2%

TOTAL VOLUME OF ALL LIQUOR SALES AND TAXES

	1976	1977	1978	1979	1980	1981
Tax Base Wholesale Sales	76,659,014.	86,229,026.	93,560,204.	88,858,525.	42,690,672.	49,181,708.
Amounts of Tax Wholesale	15,331,803.	17,245,821.	18,712,041.	17,771,705.	8,538,135.	9,836,342.
Penalties & Interest	5,779.	21,837.	14,069.	27,186.	26,583.	35,031.
Permit Fees	117.	116.	122.	120.	135.	162.
Total Collections	15,337,699.	17,267,774.	18,726,232.	17,799,011.	8,564,853.	9,871,535.

SCHEDULE OF SALES FOR LIQUOR MANUFACTURED IN HAWAII

	1976	1977	1978	1979	1980	1981
Total Sales	4,518,087.26	3,596,394.34	3,450,597.99	1,420,481.52	558,768.91	728,684.02
Liquor Tax At 20%	903,617.45	719,278.87	690,119.60	284,096.30	111,753.78	145,736.80
Tax Base Wholesale Sales	76,659,014.	86,229,026.	93,560,204.	88,858,525.	42,690,672.	49,181,708.
Amounts of Tax Wholesale	15,331,803.	17,245,821.	18,712,041.	17,771,705.	8,538,135.	9,836,342.
Penalties & Interest	5,779.	21,837.	14,069.	27,186.	26,583.	35,031.
Permit Fees	117.	116.	122.	120.	135.	162.
Total Collections	15,337,699.	17,267,774.	18,726,232.	17,799,011.	8,564,853.	9,871,535.

APPENDIX B

(Caption Omitted)

COMPLAINT FOR REFUND OF LIQUOR TAXES

[Bacchus Imports, Ltd.]

(Filed June 29, 1979)

I. PARTIES

1.01 Bacchus Imports, Ltd. is a corporation organized and existing under the laws of the State of Hawaii, whose principal place of business is in Honolulu, Hawaii. It is licensed by the State of Hawaii as a wholesaler of beer and wine pursuant to § 281-31 of the Hawaii Revised Statutes (1968), as amended, and as a permittee pursuant to § 244-2 of the said Hawaii Revised Statutes. It also holds an Importer's License, No. HI-I-841, and a Wholesaler's License No. HI-P-2946, issued by the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury pursuant to Title 27, Section 204 of the United States Code.

1.02 Defendant GEORGE FREITAS is the Director of Taxation of the State of Hawaii, and in such capacity is charged with administering the Liquor Tax Law of the State of Hawaii (chapter 244 of the said Hawaii Revised Statutes, hereinafter referred to as "the Liquor Tax Law").

II. JURISDICTION

2.01 Beginning on or about January 30, 1978, plaintiff has filed with defendant each month as the same were due liquor tax returns on the form and in the manner prescribed by the Liquor Tax Law, and has each month paid

the amount of tax shown on such return, in the total amount of $75,060.22.

2.02 On May 30, 1978 plaintiff sent to defendant, together with its liquor tax return and payment for the month of April 30, 1979, a letter protesting that payment and all previous payments of such tax, a true copy of which is attached hereto as Exhibit A and incorporated herein by reference.

2.03 This action has been commenced within thirty days from the date of such payment and protest, and with respect to such is brought pursuant to Section 40-35 of the Hawaii Revised Statutes, under which Section this court has jurisdiction of this action.

2.04 Jurisdiction of this court as a Circuit Court of the First Circuit is also invoked pursuant to H. R. S. § 603-21.5 for the claim for refund of all payments of tax prior to May 30, 1970 as stated below.

III. COUNT I—CLAIM UNDER ARTICLE I, SECTION 10, CLAUSE 2 OF THE UNITED STATES CONSTITUTION

3.01 Plaintiff imports wine and beer into the State of Hawaii, warehouses such wine and beer on premises licensed by agencies of both the United States and the State of Hawaii, and sells such wine and beer at wholesale.

3.02 Wine and beer imported into Hawaii by plaintiff comes into the State via three different routes:

(1) Wine and beer originating in foreign countries whose first port of entry under the United States Customs laws is Honolulu, Hawaii;

(2) Wine and beer originating in foreign countries whose first port or place of entry under the United States Customs laws is a port or place other than Honolulu, Hawaii; and

(3) Wine and beer originating in one of the forty-nine other States of the United States.

3.03 All of such wine and beer is imported in the cartons or cases in which it was originally packed and shipped, and when sold by the case is sold by plaintiff in such original cartons or cases. Beer is sold only by the case; wine is occasionally sold by the bottle or withdrawn as a sample, and is pulled for such occasion from the case in which it was shipped or from the shelves in plaintiff's warehouses reserved for storage of less than full cases.

3.04 Wine and beer whose first customs port of entry is Honolulu is purchased by plaintiff from its foreign producer or shipper, or from the agent of such foreign producer or shipper, and is received in Honolulu at Pier 39, Foreign Trade Zone No. 9, which is a duly authorized foreign trade zone pursuant to Title 19, Chapter 1A of the United States Code. It is unloaded and stored in bond in either plaintiff's own leased area within such Zone or in the general public storage area operated by the Zone itself. Customs duties on such wine and beer are not paid until the wine or beer is subsequently withdrawn from such bonded storage.

3.05 Wine and beer first brought into the United States at a place other than Honolulu is imported (and duty on it is paid) by an importer other than plaintiff. Plaintiff subsequently purchases such wine or beer from such primary importer and has it shipped to Honolulu,

where it is stored in plaintiff's non-bonded storage facilities until sold or otherwise used.

3.06 Wine and beer originating in one of the other states of the United States is purchased by plaintiff from its producer or from the agent of its producer and is shipped and stored in the same manner described in paragraph 3.05 above.

3.07 Plaintiff's "wholesale price" for wine and beer imported by it is determined by adding a percentage markup to its "landed cost" for such wine and beer. Plaintiff's landed cost for such wine and beer is determined by adding to its original cost in dollars the following costs:

(1) Inland freight to the port of shipment to Honolulu;

(2) Ocean (or air, as the case may be) freight to Honolulu (including any currency adjustment fees added by the shipping company);

(3) Wharfage fees at Honolulu;

(4) Drayage charges for transportation to plaintiff's warehouse;

(5) Customs brokerage fees;

(6) Customs duties; and

(7) Warehouse handling charges.

3.08 Plaintiff sells wine and beer to licensees in the State of Hawaii at a price equal to its wholesale price as above determined, plus the twenty percent tax imposed by Section 244-4 of the Liquor Tax Law, plus the one-half percent tax imposed by Section 237-13 of the said Hawaii Revised Statutes.

3.09 Sales to licensees are upon invoices due and payable in thirty days. Plaintiff is obligated by the Liquor Tax Law to file its return and remit the twenty percent tax on its taxable sales by the close of the month following the month for which sales are reported. The tax is due and owing whether or not plaintiff's customers have paid their invoices as of that date. A substantial number of plaintiff's customers take more than thirty days to pay their bills.

3.10 The only liquors manufactured commercially in Hawaii are okolehao, a type of brandy distilled from the native ti plant; various flavored fruit liquers; and a fruit wine made from pineapple. At present, all of Hawaii's commercially available whisky, gin, rum, vodka and other spirits (except for okolehao), wines made from grapes, and beer are imported into the State. The Liquor Tax Law exempts okolehao and fruit wines made in Hawaii from the twenty percent liquor tax until July, 1981.

3.11 The Hawaii liquor tax is an unconstitutional State tax upon imports in that it discriminates against imported liquors in accordance with their place of origin since it specifically exempts Hawaii's only domestically produced liquors (except for liquers).

3.12 Furthermore, it interferes with the operation of the federal customs laws by adding to the federal customs duties on imported wines and spirits a surcharge of 20%, thereby taxing revenue of the federal government and rendering such wines and spirits (particularly champagne, whose duty rate is approximately ten times that of still wine) more expensive and ultimately less desirable for the consumer, resulting in a decreased volume of im-

port purchases and decreased customs revenues to the federal government.

3.13 The Hawaii Liquor Tax further discriminates against imports in accordance with their place of origin by placing the heaviest tax burden on those imports which come from the farthest away. It does this by adding a surcharge of twenty percent to the cost of freight to bring the imported liquor to Hawaii, so that for example, wines from France (halfway around the world from Hawaii) are taxed significantly more than their equivalents produced in and imported from California. The result again is to make wines of comparable quality and cost of production unequal in the eyes of the consumer, such that an imported wine or liquor will always cost more than its domestic equivalent.

3.14 The effect of the tax in this regard can be illustrated simply by showing the net result on the price to the consumer of an increase of $1.00 in the cost (F. O. B. the winery) of a bottle of French, Californian, and Hawaiian wine, respectively. In a typical case, for every dollar of increase in the cost of a French wine, the Hawaii consumer will end up paying $3.23 more; in the case of a California wine, he will pay $2.38 more, while in the case of an Hawaiian wine, he will pay only $1.91 more. These represent increases of 223%, 138% and 91%, respectively, with the most burdensome increase being borne by the foreign import, and the next most burdensome increase being borne by the domestic import.

3.15 By thus discriminating against imports as such, the Hawaii Liquor Tax is a State-imposed duty on im-

ports in violation of Article I, Section 10, Clause 2 of the United States Constitution.

COUNT II—A CLAIM UNDER ARTICLE I, SECTION 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION

4.01 Paragraphs 1.01 and 1.02, 2.01 through 2.04, and 3.01 through 3.14 above are herewith realleged and incorporated in this Count II by reference.

4.02 The Hawaii Liquor Tax discriminates in the manner above-detailed against both imports of liquor from foreign countries and imports of liquor from the other forty-nine states, and in so doing places an undue burden upon foreign and upon interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution.

COUNT III—A CLAIM UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION

5.01 Paragraphs 1.01 and 1.02, 2.01 through 2.4, and 3.01 through 3.14 above are herewith realleged and incorporated into this Count III by reference.

5.02 Plaintiff has fully complied with all applicable federal licensing statutes and regulations, has paid all current federal licensing fees and occupational taxes, and has acquired and presently holds from the federal government the right to import and to sell at wholesale wine and malt beverages.

5.03 The imposition by the State of Hawaii of a tax upon the first sale by plaintiff of wine and malt beverages

imported by it into Hawaii is in derogation of plaintiff's federally licensed right to import, which, as the object of importation is sale, necessarily includes the right to make a first sale free from let or hindrance by any State.

5.04 The Hawaii Liquor Tax, as imposed on a first sale at wholesale of liquor imported by plaintiff into Hawaii, is accordingly an attempt to exercise a revenue-raising power in an area reserved to Congress under the United States Constitution, and as such is invalid under Article VI of said Constitution and under decisions of the United States Supreme Court consistently applied for over one hundred and fifty years since the case of ***Brown v. Maryland,*** 12 Wheat. 419, in 1827.

WHEREFORE, plaintiff prays that judgment issue against defendant directing him to refund all liquor taxes paid by plaintiff from January 1978 to the date of judgment, together with interest thereon as allowed by law, and for such other and further relief as may be fitting and just.

DATED: Honolulu, Hawaii, June 29, 1979.

/s/ Allan S. Haley
Attorney for Plaintiff

BACCHUS IMPORTS, LTD.

May 30, 1979

Director of Taxation
State of Hawaii
225 Queen St.
Honolulu, Hawaii 96813

Gentlemen:

Bacchus Imports, Ltd. herewith gives notice pursuant to H. R. S. (Section 40-35) (1968), that it intends to appeal

assessment of the liquor tax shown on the enclosed return, on the ground that the aforesaid liquor tax (H. R. S. Chapter 244) is repugnant to the Constitution and the laws of the United States, as applied to sales of liquor by Bacchus Imports.

Specifically, said liquor tax violates the Import and Export clause (Art. I, Section 10, Clause II) of the Constitution in so far as it requires Bacchus to pay any tax at the time of first sale of the liquor, and said tax further violates both said Import/Export clause and the Commerce clause (Art. I, Section 8, Clause III) by imposing an ad valorem rate of 20% on the wholesaler/importer's cost of freight, customs duties, and markup, thus discriminating in a substantial way against imports while at the same time exempting liquor (Okolehao) and fruit wines of Hawaii manufacture.

This protest applies to the entire amount of liquor tax paid by Bacchus since December 1977 and refund will be sought for such entire amount pursuant to H. R. S. (Section 244.-8).

Very truly yours,

By: John C. Graham, Jr.

Vice-President

(Caption Omitted)

COMPLAINT FOR REFUND OF LIQUOR TAXES
[Eagle Distributors, Inc.]

(Filed September 28, 1979)

I. PARTIES

1.01 Eagle Distributors, Inc. is a corporation organized and existing under the laws of the State of Hawaii, whose principal place of business is in Honolulu, Hawaii, with other places of business at Hilo, Kailua-Kona, Kahului, and Lihue, in the State of Hawaii. It is licensed

by the State of Hawaii as a wholesaler of beer and wine pursuant to § 244-2 of the said Hawaii Revised Statutes. It also holds an Importer's License, No. HI-I-796, and Wholesaler's Licenses for each of its locations, issued by the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury pursuant to Title 27, Section 204 of the United States Code.

1.02 Defendant George Freitas is the Director of Taxation of the State of Hawaii, and in such capacity is charged with administering the Liquor Tax Law of the State of Hawaii (Chapter 244 of the said Hawaii Revised Statutes, hereinafter referred to as "the Liquor Tax Law").

II. JURISDICTION

2.01 For more than five years prior to the date hereof, plaintiff has filed with defendant each month as the same were due liquor tax returns on the form and in the manner prescribed by the Liquor Tax Law, and has each month paid the amount of tax shown on such return, in the total amount for the five year period August 1974-July 1979 of $10,744.047.00.

2.02 On August 31, 1979, plaintiff sent to defendant together with its liquor tax return and payment for the month of July, 1979, a letter protesting that payment and all payments of such tax over the previous five years, a true copy of which is attached hereto as Exhibit A and incorporated herein by reference.

2.03 This action has been commenced within thirty days from the date of such payment and protest, and with respect to such is brought pursuant to Section 40-35 of

the Hawaii Revised Statutes, under which Section this court has jurisdiction of this action.

2.04. Jurisdiction of this court as a Circuit Court of the First Circuit is also invoked pursuant to H. R. S. § 603-21.5 for the claim for refund of all payments of tax for the five years prior to August 31, 1979.

III. COUNT I—CLAIM UNDER ARTICLE I, SECTION 10, CLAUSE 2 OF THE UNITED STATES CONSTITUTION

3.01 Plaintiff imports beer into the State of Hawaii, warehouses such beer on premises licensed by agencies of both the United States and the State of Hawaii, and sells such beer at wholesale.

3.02 Beer imported into Hawaii by plaintiff is manufactured in California or one of several other States, and shipped overland to the ports of Oakland or Los Angeles for shipment by ocean freighter to plaintiff.

3.03 All of such beer is imported in the cartons or cases in which it was originally packed and shipped, and is sold by plaintiff only in such original cartons or cases.

3.04 Such beer is purchased by plaintiff from its producer or from the agent of its producer.

3.05 Plaintiff's "wholesale price" for beer imported by it is determined by adding a percentage markup to its "landed cost" for such beer. Plaintiff's landed cost for such beer is determined by adding to its original cost (including Internal Revenue Taxes pursuant to 26 U. S. C. § 5051):

(1) Inland freight to the port of shipment to Honolulu;

(2) Container and wharfage charges at the port of loading, as charged by the shipping company;

(3) Ocean (or air, as the case may be) freight to Honolulu;

(4) Wharfage fees at Honolulu;

(5) Drayage charges for transportation to plaintiff's warehouse; and

(6) Warehouse handling charges.

3.06 Plaintiff sells beer to licensees in the State of Hawaii at a price equal to its wholesale price as above determined, plus the twenty percent tax imposed by Section 244-4 of the Liquor Tax Law, plus the one-half percent tax imposed by Section 237-13 of the said Hawaii Revised Statutes.

3.07 Sales to licensees are upon invoices due and payable in thirty days. Plaintiff is obligated by the Liquor Tax Law to file its return and remit the twenty percent tax on its taxable sales by the close of the month following the month for which sales are reported. The tax is due and owing whether or not plaintiff's customers have paid their invoices as of that date. A substantial number of plaintiff's customers take more than thirty days to pay their bills.

3.08 The only liquors manufactured commercially in Hawaii are okolehao, a type of brandy distilled from the native ti plant; sake; various flavored fruit liquers; and a fruit wine made from pineapple. At present, all of

Hawaii's commercially available whisky, gin, rum, vodka and other spirits (except for okolehao), wines made from grapes, and beer are imported into the State. The Liquor Tax Law exempts okolehao and fruit wines made in Hawaii from the twenty percent liquor tax until July, 1981.

3.09 As applied to sales of beer by plaintiff, the Hawaii Liquor Tax is an unconstitutional State tax upon imports in that it discriminates against such beer in accordance with its place of origin since it specifically exempts Hawaii's only domestically produced liquors (except for liquers).

3.10 Furthermore, it interferes with the operation of the federal revenue laws by adding to the federal excise taxes on beer a surcharge of twenty percent, thereby taxing revenue of the federal government.

3.11 The Hawaii Liquor Tax further discriminates against imports in accordance with their place of origin by placing the heaviest tax burden on those imports which come from the farthest away. It does this by adding a surcharge of twenty percent to the cost of freight to bring the imported liquor to Hawaii.

3.12 By thus discriminating against imports as such, the Hawaii Liquor Tax is a State-imposed duty on imports in violation of Article I, Section 10, Clause 2 of the United States Constitution.

VI. (sic) COUNT II—A CLAIM UNDER ARTICLE I, SECTION 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION

4.01 Paragraphs 1.01 and 1.02, 2.01 through 2.04, and 3.01 through 3.11 above are herewith realleged and incorporated in this Count II by reference.

4.02 The Hawaii Liquor Tax discriminates in the manner above-detailed against imports of beer from the other forty-nine states, and in so doing places an undue burden upon interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution.

V. (sic) COUNT III—A CLAIM UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION

5.01 Paragraphs 1.01 and 1.02, 2.01 through 2.04, and 3.01 through 3.11 above are herewith realleged and incorporated into this Count III by reference.

5.02 Plaintiff has fully complied with all applicable federal licensing statutes and regulations, has paid all current federal licensing fees and occupational taxes, and has acquired and presently holds from the federal government the right to import and to sell at wholesale malt beverages.

5.03 The imposition by the State of Hawaii of a tax upon the first sale by plaintiff of malt beverages imported by it into Hawaii is in derogation of plaintiff's federally licensed right to import, which, as the object of importation is sale, necessarily includes the right to make a first sale free from let or hindrance by any State.

5.04 The Hawaii Liquor Tax, as imposed on a first sale at wholesale of liquor imported by plaintiff into Hawaii, is accordingly an attempt to exercise a revenue-raising power in an area reserved to Congress under the United States Constitution, and as such is invalid under Article VI of said Constitution and under decisions of the United States Supreme Court consistently applied for over

one hundred and fifty years since the case of *Brown v. Maryland,* 12 Wheat. 419, in 1827.

WHEREFORE, plaintiff prays that judgment issue against defendant directing him to refund all liquor taxes paid by plaintiff from August, 1974 to the date of judgment, together with interest thereon as allowed by law, and for such other and further relief as may be fitting and just.

DATED: Honolulu, Hawaii, September 26, 1979.

/s/ Allan S. Haley
Attorney for Plaintiff

APPENDIX C

(Excerpts from Hawaii Revised Statutes)

§ 244-5 Statement of Tax as separate part of price. A dealer may state the amount of the tax accruing on a sale as a separate part of the price charged by him, but shall not be required to do so; however, section 281-83 shall not apply unless the amount of the tax has been so separately stated. [L 1939, c 222, § 6; RL 1945, § 5605; am L 1949, c 343, § 4; RL 1955, § 124-5]

§ 244-6 Return, form, contents. Every taxpayer shall, on or before the last day of each month, file with the department of taxation in the taxation district in which his business premises are located, or with the department in Honolulu, a return showing all sales of liquor made by him during the preceding month, showing separately the amount of the nontaxable sales, and the amount of the taxable sales, and the tax payable thereon. The return shall also show the amount of liquor used during the preceding month which is subject to tax, and the tax payable thereon. The form of return shall be prescribed by the department and shall contain such information as it may deem necessary for the proper administration of this chapter. [L 1939, c 222, § 8; RL 1945, § 5607; am L 1947, c 111, pt of § 14; am L 1949, c 343, § 6; RL 1955, § 124-6; am L Sp 1959 2d, c 1, § 16; am L 1966, c 19, § 4; am L 1967, c 37, § 1]

§ 281-83 Payment of liquor tax to be made. Whenever liquor is purchased by the holder of a retail, dispenser, club, cabaret, hotel, or vessel license from the holder of a manufacturer's or wholesale license, the amount added to the price on account of the tax imposed by chapter

244, as provided by section 244-5, shall be paid by the purchaser within twenty days after the end of the month in which the purchase has been made. On the failure to make the payment within such time the liquor commission may in its discretion suspend the license of the purchaser for a period of not more than ten days for the first failure and not more than twenty days for any subsequent failure.

The holder of a manufacturer's or wholesale license shall report the failure of a purchaser to comply with this section to the commission of the county in which the purchaser holds a license, in order that the suspensions provided by this section may be enforced by the commission. Any holder of a manufacturer's or wholesale license who fails to make such report may likewise be subject to the suspensions hereinabove provided [L Sp 1941, c 89; § 1 (e); RL 1945, § 7271; am L 1947, c 148, § 2; RL 1955, § 159-82; HRS § 281-83; am L 1976, c 87, § 3]